

Date of decision: 13/02/96

For Approval and Signature:

Hon'ble MR.JUSTICE D.G.KARIA

1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

DIPTIBENVIBHAKAR CHOKSHI vs VIBHAKAR CHINUBHAI CHOKSHI

Appearance: MR VC DESAI for Petitioners.

MR.P.M.THAKKAR,SR.ADVOCATE WITH MR.A.R.THAKKAR,FOR RESPONDENT NO.1.

MS.K.N.VALIKARIMWALA,ADDL.PUBLIC PROSECUTOR,FOR RESPONDENT NO.2.

Coram : MR.JUSTICE D.G.KARIA

#### ORAL JUDGEMENT

The original petitioner-wife and her two children have preferred this Criminal Revision Application against the judgment and order dated June 30,1984 passed by the learned Metropolitan Magistrate, Court No.15,Ahmedabad, rendered in Criminal Case No.38 of 1983. The said case was for awarding maintenance under section 125 of the Code of Criminal Procedure, 1973. By the impugned judgment and order, the learned Metropolitan Magistraterejected the claim for maintenance so far as the peptitioner-wife is concerned. The learned Magistrate awarded Rs.100/- each by way of maintenance to both the children.

At the outset it may be stated that this is an unfortunate case wherein several attempts were made even by this Court (Coram: D.C.Gheewala,J., J.U.Mehta,J. and B.J. Shethna,J. (as they were then)) to reconcile the matter between the petitioner-wife and the respondent-husband. It is said that the trial Court had also made several attempts in that direction. By calling the parties, earnest effort was made by me to see that the dispute is settled between the parties. However, it was futile.

It is an admitted fact that the petitioner-wife and the respondent-husband were married on 5.2.1976 according to Hindu rites and rituals. Thereafter the petitioner wife, according to her case, was kept and maintained well for about one year. There are two children, a daughter named Jalpa, aged about 19 years at present, and a son named Malay, aged about 17 years at present, out of the said wedlock. After marriage, both the spouses resided in a joint family where the wife of respondent no.1's elder brother Rajesh and other family members used to ill-treat the petitioner-wife, alleging that she did not know how to iron the clothes and used to insult her saying that she was insane. It is the case of the petitioner-wife that she used to bring all these facts to the notice of the respondent-husband, but he did not pay any attention to it. She has averred that the cruelty increased after the birth of son Malay and after sending Jalpa to school. The cruelty was to such an extent that the children were not provided adequate meals regularly and she was taunted in this behalf. It is the case of the petitioner-wife that she was also being beaten.

The petitioner-wife averred that a complaint was lodged against her in the Kalupur Police Station alleging that the petitioner-wife has stolen two pieces of gold weighing two tolas. The alleged incident of removal of the gold pieces had taken place on 3.9.1982 and in respect thereof a criminal complaint was concocted on 6.12.1982 against the petitioner-wife. The petitioner and her children were sent to her father's place somewhere in December 1982. The petitioner-wife was constrained to take anticipatory bail by filing Criminal Misc. Application No.72/83 in respect of the aforesaid allegation of theft. Ultimately, by the order dated June 27, 1983, the said complaint of theft came to be rejected by the learned Chief Metropolitan Magistrate, Ahmedabad, holding that the allegations against the petitioner-wife were baseless. It is the case of the petitioner that she is driven away from the house by the respondent-husband and his family-members after causing physical and mental cruelty. According to the petitioner, the respondent-husband has been serving in Cellulose Products at Kathwada. Besides, he is also conducting a shop of

money lending at Bhoiwada, Kalupur Chakla in Ahmedabad. He has also immoveable and moveable properties. She, therefore, claimed Rs.400/per month by way of her maintenance and Rs.300/-per month for each of the children from the date of the application.

Respondent-husband filed his written statement contending, inter alia, that he behaved as an ideal husband and discharged his duties as such. He denied the allegations with regard to physical and mental cruelty to the petitioner by him or by his family members. He also denied the allegation of having insulted the petitioner-wife, calling her insane and that she did not know how to iron the clothes. The respondent-husband alleged that the petitioner-wife was quarrelsome, rigid and he made all earnest efforts to improve her temperament, but there was no improvement. She insisted to live separately from the joint family. It is alleged that the petitioner-wife is being instigated by her step-mother and she has been making all false allegations without any basis. She has gone away to stay at her parent's house without any consent of the respondent-husband. It is also contended in the written statement that the petitioner-wife used to commit thefts of the golden ornaments from the house of the respondent-husband, after the death of the father of the respondent-husband. However, no complaint was lodged for the sake of the prestige of the family and that the petitioner-wife agreed not to repeat it in future. The petitioner committed theft of golden ring, gold pieces etc. and she also admitted of such theft on 1.11.1982 in presence of other family members of the respondent-husband. It is further alleged that at about 9.00 in the morning on 1.11.1981 the petitioner had gone to her parents' place with the children saying that she would return with the valuable ornaments and the clothes, but she did not return. When an attempt was made to bring the petitioner-wife back home, the respondent-husband was insulted and was abused. Thereafter, the respondent-husband was compelled to stay separately from the joint family. The petitioner-wife did not bother or care for the respondent-husband or the children. Thereafter she has left for her parents' house. According to the respondent, the petitioner-wife had gone to her parents' place to bring the stolen articles back, but thereafter she did not return. He has reiterated that a complaint of theft for the offence under section 380 of the Indian Penal Code was lodged against the petitioner-wife. Respondent-husband has stated several other details and particulars of items of which the petitioner-wife had not given accounts. The particulars being trifles, the details are not mentioned herein. The respondent husband admitted that he is serving at Kathwada. He has to incur Rs.75/- by way of transport charges to reach Kathwada. The factory wherein the respondent-husband is working was closed for sometime and hence he had to incur debt. He contended that the

shop of money lending was closed after death of his father. The immoveable and moveable properties such as T.V., Fridge, Scooter, etc. are joint family properties. The respondent-husband, therefore, denied the claim of the petitioner-wife for maintenance. He sought the dismissal of the maintenance application.

The learned Magistrate having recorded the evidence and on appreciation thereof and the other material on record, came to the conclusion that the respondent-husband having sufficient means, has not neglected or refused to maintain the petitioner-wife. The learned Magistrate also held that the petitioner had deserted the respondent-husband. He, however, concluded that the petitioner-wife was unable to maintain herself. Eventually, he awarded Rs.100/- each to both the children and dismissed the application of the petitioner-wife for maintenance.

Mr. Viresh C. Desai, learned Advocate appearing for the petitioner-wife, has taken me through the impugned judgment and the judgment rendered in theft case wherein the petitioner was acquitted holding, inter alia that the allegations against the petitioner were baseless. Mr. Desai submitted that the impugned judgment dismissing the application for maintenance of the petitioner-wife was improper and erroneous, inasmuch as the petitioner-wife was constrained to live with her parents on account of physical and mental cruelty to her. The learned Magistrate has misread or omitted to read the material evidence in this regard. In support of his submission, Mr. Desai also relied on the decision in the case of Ganesh Sao Hari Prasad Sao vs. Sm. Sheomala Devi, AIR 1950 Nagpur 168. Mr. P. M. Thakkar, learned Senior Advocate appearing for the respondent-husband, having referred to and relied upon several observations in the impugned judgment, contended that the respondent-husband was and is willing and ready to keep and maintain the petitioner-wife and the children. According to him, there is no negligence or refusal on the part of the respondent-husband and therefore no maintenance could be awarded to the petitioner-wife under section 125 of the Code of Criminal Procedure, 1973.

I have perused the impugned judgment and the other material on record. The finding of the learned Magistrate that the petitioner-wife has voluntarily deserted the respondent-husband cannot be sustained, as there is clear evidence on record that the petitioner-wife was treated with cruelty. It is true that the stand of the respondent-husband was and is that he was ready and willing to keep and maintain the respondent-wife and the children. However, in a case for maintenance it is no defence for a husband to say that he is prepared to take his wife back if the facts show that the wife

has reasonable cause for fearing to return to the husband's home. It is evident from the record of the case that the wife was ill-treated, inasmuch as a false allegation of theft was made against her and even the criminal complaint for the offence under section 380 of the Indian Penal Code was lodged against her and she was made to be arraigned as an accused person in the criminal Court. Considering the contents of the judgment of acquittal, it is clear that the allegations of theft made against the petitioner-wife were totally baseless. As is recited in the said judgment, the respondent-wife had given an application on 2.11.1982 to the police wherefrom it was clear that the relations between the parties were strained. Thereafter, a complaint for theft was lodged against the petitioner-wife on 6.12.1982. Even the golden ornament which was said to be removed by the petitioner-wife was produced by the respondent-husband before the Police. Thus, as observed by the learned Magistrate, the allegations of theft were without any foundation. When such allegations are made, the petitioner-wife would be justified not to live with the respondent-husband. In the facts and circumstances of the case, it cannot be said that the offer of the respondent-husband to keep and maintain the petitioner-wife is genuine and bona fide. The period of separation between both the spouses is considerably long. The children have now become major. The daughter, Jalpa is studying in the College for F.Y.Science. During the course of the attempt for reconciliation, it is noticed that the children are also not in a position to compromise and stay with the father. Apart from failure of reconciliation and without being prejudiced about it, I am of the view that the offer of the respondent husband to keep and maintain the petitioner-wife and the children cannot be said to be bona fide, having regard to the facts and circumstances of the case.

Mr.P.M.Thakkar, learned Senior Advocate appearing for the respondent-husband, contended that the criminal complaint for theft was lodged by the brother of the respondent-husband against the petitioner-wife and that the respondent-husband tried to reconcile the matter. However, it is clear from the contents of the written statement that the respondent-husband has reiterated all those allegations of theft against the petitioner-wife. Therefore, the ratio laid down in the case of Ganesh Sao vs. Sheomala Devi (supra) would be squarely applicable to the facts of the present case. It is held in the said decision that in a claim for maintenance it is no defence for a husband to say that he is prepared to take his wife back if the facts show that the wife has reasonable cause for fearing to return to the husband's home. If a wife has been ill treated and there is ground for believing that if she returns the ill-treatment will continue, then the wife is entitled to live apart from her husband. Causing a wife to leave the protection of the husband by ill-treatment is tantamount to driving the

wife deliberately from the home.

As observed hereinabove, the allegations regarding theft of golden ornaments were repeated and reiterated by the respondent-husband in his written statement. The criminal case for theft appears to have been lodged out of sheer vengeance. Under the circumstances, the petitioner-wife would be justified not to accept the offer of the husband and thereby to live with him. In the facts and evidence of the case, the findings of the learned Magistrate that it was the petitioner-wife, who had deserted the respondent-husband cannot be sustained. The respondent has sufficient means. He is supposed to maintain his wife and children.

In the above view of the matter, the Revision Application is allowed. The impugned judgment and order, so far as it relates to dismissal of the claim of the petitioner-wife is quashed. The petitioner-wife is awarded Rs.400/- per month Application, i.e. 12.9.1984. It will be open for the respondent-husband to move the concerned Court for appropriate instalments with regard to payment of arrears of maintenance. The learned Magistrate will decide the issue as to payment of arrears of maintenance on merits and having regard to the present income of the respondent-husband. Rule is accordingly made absolute.

\*\*\*